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No. 93-867

In the Supreme Court of the United States

OCTOBER TERM, 1993

GEORGE J. FOXX, PETITIONER

v.

JOHN H. DALTON, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ROBERT S. GREENSPAN
RICHARD A. OLDERMAN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner was denied a promotion and fired because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16.

2. Whether petitioner was given adequate notice before he was fired.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 4 F.3d 984 (Table). The memorandum opinion of the district court (App., *infra*, 1a-9a) is also unpublished.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1993. The petition for a writ of certiorari was filed on November 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, who is black, is a former civilian employee of the United States Navy. From January, 1984, through June, 1989, he was a Supervisory Computer Systems Analyst for the Navy in Alameda, California. In May, 1989, he was offered a position as a Senior Management Official with the Navy in Panama. Petitioner alleges that, at the time he was offered this position, he was told that if he accepted the offer, he would receive a one-grade promotion after six months. Petitioner accepted the offer and arrived in Panama on July 17, 1989. Pet. App. A2; App. *infra*, 2a.

Petitioner was not promoted. Rather, in a letter dated May 17, 1990, petitioner's supervisor proposed to terminate him for falsifying travel vouchers. C.A. App. 13-15. The letter told petitioner that the termination would not take effect for 30 days. *Id.* at 13. Petitioner responded to the proposed termination in writing; in his submission, he admitted that he had submitted a false travel voucher but claimed that he did so only "to facilitate finalization" of his claim for expenses. *Id.* at 130; see also *id.* at 126-131. He was removed from federal service effective June 22, 1990. *Id.* at 132. In the meantime, he lost his security clearance. *Id.* at 125; see also App., *infra*, 3a-4a.

After petitioner's supervisor declined to reconsider the termination decision (C.A. App. 136), petitioner sought review of that decision before the Merit Systems Protection Board (MSPB or Board). After a hearing, an administrative law judge of the Board upheld the termination, finding that it was not motivated by race or sex discrimination but, instead,

by petitioner's falsification of travel vouchers. *Id.* at 103-116. On review, the Equal Employment Opportunity Commission (EEOC) also upheld petitioner's termination based on the finding that he was fired for defrauding his employer and not because of his race or sex. *Id.* at 137-140; see also Pet. App. A2; App., *infra*, 4a.

2. Petitioner then filed this action under 5 U.S.C. 7703. Counts 1 and 2 of his complaint alleged that the Navy's decisions not to promote him and to terminate him violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, because they were motivated by his race. (Petitioner did not renew his claim of sex discrimination.) Count 3 alleged that the Navy was required to give him 30 days' notice before terminating him but failed to do so. C.A. App. 6-11.

The district court granted summary judgment for the Navy on Counts 1 and 2. The court found "a conflict in the evidence as to whether any racial discrimination was practiced upon the plaintiff" during his employment with the Navy. App., *infra*, 7a.[1] But the court found "no dispute" that "[peti-

[1] Petitioner asserted, as evidence of race discrimination, (1) that he was the only black person in a high-level civilian position at the Panama Naval Station; (2) that his supervisor expressed disappointment upon learning of his race; (3) that, after petitioner arrived in Panama, a subordinate employee informed another subordinate employee of petitioner's race; (4) that two subordinate female officers filed false sexual harrassment claims against him, at the instance of their superiors, because of his race; and (5) that his supervisor and other employees played a practical joke on him at a Christmas party because of petitioner's race. Both the MSPB and the EEOC expressly considered these assertions and determined that they did not establish that petitioner was denied a promotion or

tioner] did * * * file a false statement" for travel expenses and admitted to doing so. "This alone," the court determined, "is sufficient for discharge of [petitioner]." *Id.* at 7a. The court accordingly held that, under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973), the Navy had "offered a legitimate, nondiscriminatory reason for both its termination of employment and failure to promote" and that petitioner "failed to show that the proffered reason for his termination was a pretext." App., *infra*, 7a-8a.

The court dismissed Count 3 of the complaint under Fed. R. Civ. P. 12(b)(6). App., *infra*, 8a-9a. It determined that the issue whether petitioner was given adequate notice of his termination was "foreclosed from consideration by this court" by petitioner's failure to raise the issue before either the MSPB or the EEOC. *Id.* at 9a.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A4. "Reviewing the district court's decision de novo," *id.* at A2, the court of appeals found no error in the district court's award of summary judgment to the Navy on Count 2 of petitioner's complaint, which was based on the district court's determination that the Navy had established a nondiscriminatory reason for terminating petitioner.

With respect to the failure-to-promote claim in Count 1 of the complaint, the court of appeals held that petitioner had "failed to raise a genuine issue of fact regarding a key element of his prima facie case." Pet. App. A3. Specifically, the court of appeals

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fired because of his race. C.A. App. 112, 139-140; see also App., *infra*, 2a-3a.

determined that petitioner had not shown that the position to which he had allegedly been promised a promotion "*remained available* by promotion to equally qualified persons after [petitioner's] application [was] rejected." *Ibid.* (citing *Wright* v. *National Archives & Records Service*, 609 F.2d 702, 714 (4th Cir. 1979) (emphasis added)).

With respect to the inadequate-notice claim in Count 3 of the complaint, the court of appeals affirmed on the ground that "the Civil Service Reform Act provides an adequate remedy for the conduct complained of." Pet. App. A3 (citing *Bush* v. *Lucas*, 462 U.S. 367 (1983)).

ARGUMENT

Petitioner challenges the lower courts' rejection of his claims of racial discrimination and inadequate notice in connection with his termination from federal employment. Those fact-bound challenges do not warrant further review.

1. The courts below correctly held that summary judgment in favor of the Navy was appropriate on petitioner's claim that the failure to promote him violated Title VII. As the court of appeals held, petitioner failed to make a *prima facie* case of discrimination on this claim, because he did not show that the position to which he sought a promotion remained available to qualified persons after he was denied it. Pet. App. A3. In addition, as the district court correctly held, the Navy affirmatively established a valid, nondiscriminatory reason for failing to promote petitioner—namely, that he falsified travel vouchers. App., *infra*, 7a-8a.

2. The courts below also correctly rejected petitioner's claim that he was terminated because of his race. As the district court (as well as the MSPB and the EEOC) found, petitioner was not fired because of his race. App., *infra*, 7a-8a; C.A. App. 112, 139-140. He was fired because, as he admitted (see C.A. App. 106, 130, 138), he falsified travel vouchers. That misconduct plainly justified his termination. See, *e.g.*, *Marable* v. *Department of the Army*, 52 M.S.P.B. 622 (1992); *Wier* v. *Department of the Army*, 54 M.S.P.B. 348 (MSPB). Although petitioner claimed that he suffered racial discrimination in the course of his employment, the district court considered the evidence petitioner cited to support that claim and held that it was not sufficient to create a genuine issue of fact concerning the cause for his determination. App., *infra*, 2a-3a, 7a-8a; see generally *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973); see also *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742, 2749 (1993); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion). That holding was sustained by the court of appeals. Pet. App. A3. Although petitioner disagrees with the lower court's determination that summary judgment was appropriate (Pet. 7-10), that disagreement does not raise any issue warranting further review.

3. Finally, there is no merit to petitioner's claim that he did not receive adequate notice before he was terminated. Contrary to petitioner's claim, the Navy *did* give him 30 days' notice. The letter of May 18, 1990, from petitioner's supervisor proposing his removal stated that removal would occur "not earlier

than thirty calendar days from your receipt of this letter." C.A. App. 13. The final notice of the decision to remove petitioner was effective on June 22, 1990, more than 30 days thereafter. *Id.* at 132. The Notification of Personnel Action likewise shows an effective date of June 22, 1990. *Id.* at 236.

Even if petitioner had not received 30 days' notice, his claim would still fail because such notice was not required.[2] Petitioner was terminated under 5 U.S.C. 7513, which requires 30 days' notice "unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed." Since petitioner was terminated for submitting a false claim for reimbursement, a crime punishable by imprisonment (see 18 U.S.C. 1001 (false statement), 18 U.S.C. 641 (theft of government property), 18 U.S.C. 287 (false claim)), the exception to Section 7513 was triggered, and the 30-day notice period did not apply.

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[2] Petitioner asserts (Pet. 11) that he was terminated only four days after he received the letter from his supervisor proposing his removal from federal service. That assertion appears to be based on the fact that his duties as a security officer were withdrawn on May 21, 1990. C.A. App. 125. While petitioner did lose some of his job duties on May 21, the termination of his employment did not occur until June 22, 1990.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ROBERT S. GREENSPAN
RICHARD A. OLDERMAN
Attorneys

FEBRUARY 1994

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

GEORGE J. FOXX, Plaintiff	)	
v.	)	CIVIL ACTION NO. 92-297-A
H. LAWRENCE GARRETT, III Secretary of the Navy, Defendant	)	

[Filed Sept. 9, 1992]

MEMORANDUM OPINION

This matter is before the court on the Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment. For reasons set forth below, Defendant's Motion for Summary Judgment is granted as to Counts I and II of the complaint, and Defendant's Motion to Dismiss is also granted as to Count III.

I

Plaintiff George J. Foxx filed this complaint and demand for jury trial pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 2000e-16, 5 U.S.C. § 4303, and the Fifth Amendment to the United States Constitution.

Plaintiff alleges in Count I that the defendant failed to upgrade/promote him due to racial discrimination; in Count II he alleges termination of employment due to racial discrimination; and in Count III he alleges termination of employment without proper notice.

Plaintiff, a black male, was a Supervisory Computer Systems Analyst for the United States Navy in Alameda, California, from January 1984 through June of 1989. He alleges that on or about May 24, 1989, he received a job offer to serve as a Senior Management Official with the United States Navy in Panama, which is a Civil Service position level of NM-11. Plaintiff received this offer of employment by telephone from the defendant's Supply Department Head, LCDR K.C. Purdy ("Purdy"). Plaintiff alleges that Purdy also promised plaintiff that if he accepted the employment, he would be upgraded and promoted to NM-12 after six months.

Plaintiff alleges the following discriminatory acts occurred:

a. On July 17, 1989, he arrived in Panama and was picked up by Purdy. Purdy asked each caucasian male if he was Mr. Foxx. When plaintiff identified himself as Mr. Foxx, Purdy exclaimed "oh shit" and gestured further disappointment.

b. On July 18, 1989, Cornelia Ceddy, caucasian female, called his office to tell employees, "Guess what, our new supervisor is black."

c. In August 1989, two caucasian females lodged a false sexual harassment complaint against plaintiff. They acknowledged they were urged by higher-ups to lodge the false complaint.

d. On Christmas Day, December 25, 1989, plaintiff was invited to Purdy's quarters for Christmas dinner. Purdy asked him to bring his own chair, which plaintiff did. When plaintiff arrived, he learned there

was an abundance of empty chairs and that he, as the only black invited, was the only guest required to bring his own chair. Purdy made a big joke and the other guests laughed upon his entering with a chair.

On November 13, 1989, plaintiff sought to attend a computer seminar at the Court of Flags Hotel in Orlando, Florida from December 4-7, 1989. Plaintiff also intended to take annual leave from December 9-18, 1989, and to visit his twelve-year old son who was living in Florida.

On November 27, 1989, the seminar was canceled, but plaintiff alleges that he was not notified of that fact until he had already arrived at the Court of Flags Hotel on December 3. In response, defendant alleges that plaintiff was in fact aware of the seminar's cancellation, and to support this contention defendant presents a signed statement and phone bill from the course offeror's employee, Carol Waganheim, who claims that she had a November 27, 1989 conversation with a person answering plaintiff's work phone as George Foxx. Plaintiff denies receiving the call. Defendant also presents a November 27 letter to plaintiff confirming the call. Plaintiff denies ever receiving such notice. Obviously, there is factual dispute as to whether plaintiff was advised of the cancellation of this trip.

Defendant further alleges that plaintiff falsified his travel voucher by indicating he had stayed one night at the Court of Flags Hotel, when in fact he had stayed at a less expensive Days Inn. The difference in cost between the two hotels is approximately $27.00, with plaintiff's travel voucher having falsely reflected the higher amount for reimbursement purposes. The plaintiff admits that he filed a claim that falsely listed the Court of Flags Hotel, but claims he was told to do so by Navy travel clerk

Sabina Culmer. Ms. Culmer's statement denies plaintiff's version.

There is also a question concerning a car rental with the Alamo Car Rental Company. Plaintiff alleges that upon learning his seminar was canceled he attempted to return the rental car, but was told that because of the contract he had signed he would be charged the full week whether he kept the car or not. The plaintiff then kept the car for personal use, assuming that the government was contractually required to pay anyway, and submitted this expense on his travel voucher. Defendant cites the testimony of a rental company official who states it was not Alamo's policy to require full payment for a car if it is returned early. Obviously, a credibility determination is required in order to resolve this issue.

Upon returning to Panama, questions were raised concerning the propriety of plaintiff's travel and accompanying expenses. The matter was referred to the Naval Intelligence Service ("NIS"), which investigated and determined that there was a probable fraud by plaintiff.

On May 17, 1990, Purdy proposed that plaintiff be removed, sending a letter to plaintiff. Purdy's letter told plaintiff that he would have thirty days before final action would be taken.

Plaintiff responded to the proposed removal in writing with documentation on May 18, and on May 25, CDR Kelley removed plaintiff from federal service. On May 29, plaintiff and his attorney met with CDR Kelly to seek reconsideration, but were not successful. Plaintiff then had a hearing before the Merit Systems Protection Board, and on October 11, 1990, Administrative Law Judge Roy J. Richardson upheld the dismissal. On January 18, 1991, Equal

Employment Opportunity Commission also upheld the dismissal.

II

This case presents itself on Defendant's Motion for Summary Judgment and Motion to Dismiss. The standards that guide the court are as follows:

a. *12(b)(6).*

When considering a 12(b)(6) motion, the plaintiff's allegations must be taken as true. *Revene v. Charles County Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989). A motion to dismiss should be denied "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *De Sole v. United States*, 947 F.2d 1169, 1177 (4th Cir. 1991) (quoting *Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456, 457 (4th Cir. 1983)).

b. *Summary Judgment.*

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c). Summary judgment is not appropriate if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where the party opposing summary judgment would have the burden of proof at trial, that party is entitled

> to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved

> favorable to him, the most favorable of possible alternative inferences from it drawn in his behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence so considered.

Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). Finally, summary judgment, [*sic*] is appropriate if the nonmoving party fails to make a showing sufficient to establish the elements necessary to his case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

The court also has to consider the standards applicable to a Title VII case, which are as follows:

a. *Title VII and Disparate Treatment Cases.*

As established in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), there are two ways to prove discriminatory treatment—by direct or indirect evidence. With the latter method, the plaintiff must establish a *prima facie* case by satisfying a four-factor test. If this is established, the defendant has the burden of producing (but not proving) a "legitimate, non-discriminatory reason" for its action. If that burden is met, then the plaintiff has the ultimate burden of proving by a preponderance of the evidence that the complained of action would still not have taken place but for the plaintiff's race. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1094-95 (1981).

In order to establish a *prima facie* case, the plaintiff must prove the existence of these four factors by a preponderance of the evidence:

> (i) that he belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (iii) that,

despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.

McDonnell Douglas, 93 S.Ct. at 1824. Because no vacancy remained open in the case at bar, under this fourth factor the plaintiff must prove that the circumstances of the action taken against him "give rise to an inference of unlawful discrimination." *Burdine*, 101 S.Ct. at 1094. This inference must be strong enough to persuade a reasonable person that the action was more likely than not the product of discrimination. *Id.* This burden is "not onerous." *Id.*

In this case there is a conflict in the evidence as to whether any racial discrimination was practiced upon the plaintiff, such as the incident involving bringing the chair to the Christmas party, allegations concerning Purdy's surprise at the plaintiff being a black male, and whether false sexual harassment charges were filed against plaintiff because he is a black male. There is also a factual dispute as to whether plaintiff had notice of cancellation of the seminar prior to his leaving for Florida. These are all questions of fact to be resolved by the trier of fact.

In this case, however, there is no dispute that the plaintiff did, in fact, file a false statement regarding the hotel in which he stayed. He admits to staying at the Days Inn rather than the Court of Flags Hotel as he listed in his travel voucher. He does not dispute the fact that the Court of Flags was approximately $27.00 more than the Days Inn, and that he nevertheless sought reimbursement based upon the falsely claimed higher priced hotel. This alone, in and of itself, is sufficient for discharge of plaintiff for being a dishonest employee. *See Fuqua v. De-*

partment of the Navy, 86 F.M.S.R. 5226 (M.S.P.B. 1986); *Montgomery v. Department of the Army*, 84 F.M.S.R. 5586 (M.S.P.B. 1984). Accordingly, defendant has offered a legitimate, nondiscriminatory reason for both its termination of employment and failure to promote plaintiff. Plaintiff has failed to show that the proffered reason for his termination was a pretext.[1] Accordingly, judgment should be rendered in favor of the defendant on Counts I and II of this complaint.

Turning now to Count III, plaintiff alleges that because he did not receive thirty days notice prior to his termination, he was terminated in violation of 5 U.S.C. § 4303 (1988), as well as the Due Process Clause of the Fifth Amendment to the United States Constitution. Defendant correctly asserts that plaintiff was removed under 5 U.S.C. § 7513 (1988), and not section 4303. Section 7513 provides for the removal of federal employees "for such cause as will promote the efficiency of the service," and is routinely the provision applied to removal for falsification of travel records. *See Schoeffler v. Department of Agriculture*, 47 M.S.P.R. 80 (M.S.P.B. 1991). Section 7513(b)(1) provides that an employee against whom a removal action is proposed is entitled to at least 30 days written notice, unless there is reasonable cause

[1] The court notes that plaintiff refers to the affidavit of Ms. Elsie Mills, who alleges that a Harvey Von Hollen, a white male, falsified a travel voucher and was merely reprimanded. The court also observes based upon the affidavits of Mr. Hollen and Ms. Mills that Mr. Hollen was a civilian employee of the Air Force who never at any time came under the authority of the Navy or the Naval personnel who dealt with the plaintiff. Therefore, contrary to plaintiff's assertion, the case of Mr. Von Hollen is irrelevant to any question as to whether *this* defendant treated blacks and whites differently under similar circumstances.

to believe that a crime for which a sentence of imprisonment may be imposed has been committed.

In the case at hand, however, plaintiff failed to raise this claim of procedural error below, and thus the issue is foreclosed from consideration by this court. *See Allred v. Department of Health and Human Services*, 768 F.2d 1128, 1130 (Fed. Cir. 1986); *Meglio v. Merit Systems Protection Bd.*, 758 F.2d 1576, 1577 (Fed. Cir. 1984). In this case, plaintiff failed to raise the issue in both his MSPB hearing, as well as in the review of that decision by the EEOC. Accordingly, this court cannot review Count III, and it is therefore dismissed for failure to state a claim upon which relief can be granted.

An appropriate order shall issue.

Sept. 9, 1992
Alexandria, Virginia

/s/ James C. Cacheris
United States District Judge